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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES STEEL CORPORATION, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioners—steel companies which own coal mines which produce coke for use in their steel production ("captive mines")—seek review of an order of the court of appeals (Pet. App. 2a-3a) dismissing their petition to review a supplemental order of the National Labor Relations Board (Pet. App. 12a-22a). The relevant facts are as follows:

a. In 1967, the Board found that the United Mine Workers of America (the "Union") and the Bituminous Coal Operators Association ("BCOA"), a multi-employer bargaining association, violated Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C.

158(e),[1] by entering into and maintaining the so-called "80-cent" provision of the 1964 amendments to the National Bituminous Coal Wage Agreement of 1950 ("Wage Agreement") (Pet. App. 12a). That provision required signatory coal operators to pay into the United Mine Workers Welfare and Retirement Fund a royalty of 40 cents on each ton of coal they produced and a royalty of 80 cents on each ton of coal they bought from a nonsignatory operator (Pet. 5). In 1968, the court of appeals denied enforcement of the Board's order and remanded the case to the Board to consider whether the 80-cent clause had the lawful object and effect of protecting the work and standards of employees in the primary bargaining unit (Pet. App. 31a-32a). *Int'l Union, United Mine Workers of America* v. *National Labor Relations Board, etc. (Dixie Mining Company and Dan S. Davison),* 399 F. 2d 977 (C.A.D.C.).[2]

b. Petitioners were not parties to the original proceeding before the Board or the court of appeals. Nor did they seek to intervene in the Board proceeding on remand,

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[1]Section 8(e), 29 U.S.C. 158(e), provides, in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from * * * doing business with any other person * * *.

[2]The proceeding came before the court on the Union's petition to review the Board's order and the Board's cross-application for enforcement. Dixie Mining Company and Dan S. Davison, two of the charging parties before the Board, intervened in the court of appeals. Dixie, a nonsignatory operator, opposed the 80-cent clause as a restriction on its sale of coal to signatories. Davison, on behalf of Riverton Coal Company, a signatory operator, opposed the clause as a restriction on Riverton's purchases of coal from nonsignatories.

although they did participate as *amici* (Pet. App. 13a, n. 3). Moreover, although petitioners are members of BCOA, and thus signatories of the Wage Agreement, they were exempted from the 80-cent clause pursuant to an agreement of the parties that the clause should apply only to commercial and not to captive mines. In 1968, petitioners signed a side agreement with the Union, which provided that: "If during the life of the [A]greement all questions concerning the lawfulness of the 80-cent clause shall have been resolved in favor of such clause by the court of last resort, the below named employer to whom such clause shall not have been applicable, shall engage in good faith negotiations * * * concerning what action may then be appropriate between it and the UMWA [the Union] under the then existing circumstances" (Pet. 7; Pet. App. 18a, n. 9).

c. On February 26, 1971, the Board issued its supplemental decision and order, finding that the 80-cent clause did not contravene Section 8(e) and dismissing the complaint against the Union and BCOA (Pet. App. 12a-22a). The Board determined, on the evidence adduced at the remand hearing, (1) that the intent of the parties in adopting the 80-cent clause was to protect the work opportunities and standards of employees under the agreement by equalizing the labor costs of signatory and nonsignatory operators; (2) that nonsignatory operators generally provided lower wages, fringe benefits, and working conditions than those established in the agreement; and (3) that the 80-cent royalty charged on purchases from nonsignatories bore a reasonable relationship to the difference between their labor costs and those of signatories (Pet. App. 14a, 38a-44a, 65a-71a). The Board noted that the 80-cent clause did not apply to the purchase of nonsignatory coal by steel companies like petitioners that own and operate captive mines (Pet. App. 18a, n. 9).

d. Shortly after the Board issued its supplemental decision and order, the court of appeals, *sua sponte*, directed that the case be consolidated with a pending proceeding involving the Protective Wage Clause ("PWC") of the National Bituminous Coal Wage Agreement, which was superseded in 1964 by the 80-cent clause.[3] Dixie Mining Company, a charging party before the Board in the 80-cent clause case and an intervenor in the original review proceeding (*supra*, p. 2, n. 2), opposed the court's reassertion of jurisdiciton over the 80-cent clause case on the ground that no petition to review the Board's supplemental order had been filed under Section 10(f) of the Act.[4] When the court denied its motion to vacate the consolidation, Dixie argued that the Board's supplemental order should be set aside. Petitioners, who had intervened in the court of appeals, also urged the court to set aside the Board's dismissal of the complaint in the 80-cent clause case. However, they did not file a petition to review.[5]

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[3]The Board's supplemental order dismissing the complaint in the PWC case (179 NLRB 479) was before the court on the petition to review of Dixie Mining Company, an intervenor in that proceeding before the Board. *Dixie Mining Company* v. *National Labor Relations Board, etc.* (C.A. D.C., No. 23,947).

[4]Section 10(f), 29 U.S.C. 160(f), provides, in relevant part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any [appropriate] circuit court of appeals of the United States * * * by filing in such court a written petition praying that the order of the Board be modified or set aside * **.

[5]Petitioners, like Dixie, had earlier moved to vacate the court's *sua sponte* consolidation of the 80-cent clause case with the pending PWC case.

e. On October 2, 1972, the court of appeals dismissed "all appeals for lack of a justiciable case or controversy and want of jurisdiction" (Pet. App. 5a). Respecting the 80-cent clause case, the court held that it lacked jurisdiction because no petition to review the Board's supplemental order had been filed under Section 10(f). The court stated (Pet. App. 9a-10a):

> Clearly the union is not aggrieved by the Board's order inasmuch as the Board's dismissal of the complaint was the action the union itself requested. The charging parties were aggrieved, but they have not as yet decided to file an appeal and obviously we cannot compel them to do so.[6]

f. On June 20, 1973, petitioners for the first time filed a petition to review the Board's supplemental decision and order dismissing the complaint in the the 80-cent clause case. The Board moved to dismiss the petition on the ground that no justiciable case or controversy was presented.[7] On November 19, 1973, the court granted the Board's motion and dismissed the petition to review (Pet. App. 2a-3a).[8]

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[6]The court held that the PWC case was moot since the clause was suspended one week before the effective date of Section 8(e), and was removed from the agreement (and replaced by the 80-cent clause) shortly after the initial Board decision finding the PWC illegal (Pet. App. 5a-7a).

[7]Effective November 12, 1971, the National Bituminous Coal Wage Agreement was amended. The new contract raised the tonnage royalties that signatories are required to pay into the United Mine Workers Welfare and Retirement Fund, both on their own coal production and on their purchases of nonsignatory coal (Pet. 8-10). As signatories to the 1971 contract, petitioners agreed that their captive mines would be fully subject to the new royalty clause (Pet. 7).

[8]The Union's motion to dismiss the petition to review on the ground that petitioners were not persons aggrieved by the Board's order was "dismissed as moot" (Pet. App. 3a).

2. The court of appeals properly dismissed the belated petition for review filed by petitioners. Since petitioners, as captive mine operators, were never subject to the 80-cent clause (*supra*, p. 3), the legality of that clause as applied to them was never litigated before, nor determined by, the Board. Moreover, the Board's decision upholding the 80-cent clause rests on findings concerning the negotiations and intent of the parties when the clause was adopted in 1964, and on contemporaneous economic data revealing a reasonable relation between the 80-cent royalty and the differential in labor costs of signatories and nonsignatories (*supra*, p. 3). Thus, the present significance of the Board's decision for petitioners is limited to its force as a precedent on the question of the legality of the current 1971 clause—a clause providing for different royalty charges, imposed on a new category of coal operators, in what may be an altered economic context (see Pet. 9-10). The courts have traditionally declined to decide such an academic question. See *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Flast* v. *Cohen*, 392 U.S. 83, 94-97; *O'Shea* v. *Littleton*, No. 72-953, decided January 15, 1974.

Even if, as petitioners assert (Pet. 14), there is a conflict between the Board's holding that the 80-cent clause did not violate Section 8(e) and the contrary view expressed by the Sixth Circuit in awarding damages against the Union under Section 303 of the Labor Management Relations Act, as amended (29 U.S.C. 187),[9] this, by itself, would not entitle petitioners to a judicial determination of the validity of that superseded clause. Nor are petitioners aided by the speculation (Pet. 16) that "it is conceivable—and perhaps probable—that the

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[9] *Riverton Coal Company (Dan S. Davison)* v. *United Mine Workers*, 453 F. 2d 1035 (C.A. 6), certiorari denied, 407 U.S. 915.

NLRB's General Counsel * * * will refuse to issue a complaint" if charges are filed based on present or future forms of the royalty clause. Issuance of such a complaint would properly depend on what the evidence showed with respect to the application and effect of the new clause in the economic situation which then existed.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.